IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.119 OF 2005.

1. Shivi Jaspal Chaudhary
   C-10976

2. Deva @ Raja Shivprasad Chaudhary
   C-10977
   lodged in the Central prison
   of Yeravada at Pune.

..Appellants
(Original Accused Nos.1 & 2)

versus

The State of Maharashtra ..Respondent.

Mrs.Sharmila Kaushik Advocate appointed for the Appellants

Shri S.S.Tatkare, APP for the respondent-State

Coram : S.B.Mhase
S.R.Sathe, JJ.
Dated : 19th October, 2005

JUDGMENT (PER S.R.SATHE,J).

1. Appellants- the original accused Nos.1 and 2 in Sessions Case No. 560 of 1997 have preferred this appeal against the judgment and order passed by the Addl. Sessions Judge, Gr. Bombay whereby both the accused were convicted for the offence punishable under Section 302 of I.P.C. and sentenced to suffer imprisonment for life and to pay fine of Rs.1000/- each i.d. to suffer S.I. for one month.

2. The brief facts giving rise to this appeal are as under:

. The complainant Abdulla Abdul Wahid Farooqui was carrying on business of selling cards, envelopes etc at Walchand Hirachand Marg, near Kabutarkhana. He as well as other persons, who used to carry on their business on foothpath used to sleep at night on footpath at Walchand Hirachand Marg, near Kabutarkhana. The deceased, in the instant case, namely Pappu Shah, who was working as a taxi driver also used to sleep there.

3. On 28.2.1998 at about 7.00 p.m. the complainant alongwith his friend went to Chembur, at night. While returning his friend got down at Kurla and the complainant got down at CST, Mumbai. Thereafter when he was proceeding towards his place of business, on foot and reached near the said place, he noticed that one person was lying on the road. At that time there was no electricity light on the road. When he went near the said person he found that he was Pappu Shah. He also noticed that Pappu Shah had sustained bleeding injury on his chest. He, therefore, immediately put him in a taxi

and took him to St. George Hospital, Mumbai. He asked Pappu Shah as to how he received injury. However, he was not in a position to speak and as such did not speak anything. After the time Pappu Shah was admitted in St. George hospital, he succumbed to the injuries after about two hours. When M.R.A.Marg Police Station was informed that injured person has been admitted in the hospital PSI Prakash Shinde went to the hospital. The injured Pappu Shah died at about 1.45 a.m. Thereafter PSI Prakash Shinde recorded the statement of Abdulla who had taken Pappu Shah to hospital. On the basis of the said statement police registered the offence.

4. Police, then drew inquest panchanama and also sent the dead body for postmortem. They also recorded statement of some persons and then arrested both the accused persons on 1.3.1997 at about 12.30 p.m. When accused No.1 was in the police custody, he made a statement before police that he would point out the knife and accordingly his statement was recorded in presence of the panchas and then he led the police and panchas to one chawl at Tardeo and after reaching near Room No.257 he asked the occupant of the said room to open the door by giving

him call and then he produced one knife which was kept in one raxine hand bag in the said room. The police attached the same under panchanama. Police also attached the clothes of the deceased. The attached property was sent to C.A. After receipt of the postmortem notes and completion of investigation, police submitted chargesheet against the accused.

5. Finding that the accused were chargesheeted for the offence punishable under Section 302 r/w. 34 of I.P.C. the learned Metropolitan Magistrate, committed the case to Sessions Court, Mumbai.

6. The Additional Sessions Judge for Greater Bombay framed charge Exhibit 1 against both the accused for the offence punishable under Section 302 r/w. 34 of I.P.C. The charge was read over and explained to the accused. They pleaded not guilty and claimed to be tried. Their defence was of total denial.

7. In order to prove the charge levelled against the accused, the prosecution examined in all eight witnesses consisting of P.W.1. Abdullah

Farooqi -exh.5, P.W.2. Satish Kundal panch Exhibit 7, Eye witness Manoj Sakori- exhibit 9, panch Sharad Dolas -Exhibit 10, another panch Devendra Jadhav-exhibit 12, panch for the place of offence Bhairulal Choudhary- Exhibit 14, Dr. Damayanti Page _Exhibit 16, and the Investigating Officer PSI Prakash Shinde-Exhibit 19. The prosecution also produced the complaint Exhibit 6, panchanama regarding production of knife Exhibit 8, Inquest panchanama Exhibit 11, panchanama regarding clothes of the deceased Exhibit 13, panchanama of the place of offence Exhibit 15, postmortem report Exhibit 17 and C.A. report Exhibit 22.

8. After considering the evidence adduced by the prosecution, the learned trial judge came to the conclusion that the evidence of complainant and eye witness Manoj Sakore Exhibit 9 is sufficient to prove guilt of the accused. He, therefore, passed the order of conviction and sentence as mentioned above.

9. Being aggrieved by the said order the accused filed the present appeal. In this appeal before us, Ms. Sharmila Kaushik, the learned

Advocate for the accused has urged three points. Firstly she submitted that admittedly at the relevant time all the lights in Bombay City had gone out of order and thus there was total dark and as such there was no possibility for the alleged eye witness Manoj Sakore to see the assailant. According to her besides the bare testimony of Manoj Sakore, there is no other evidence on record and as such it cannot be said that the prosecution has proved beyond reasonable doubt that accused assaulted the deceased. Secondly, she canvassed before us that the evidence regarding production is not trust worthy. It is not alleged that the accused No.2 has given any blow to the deceased. So, there is absolutely no evidence to hold accused No.2 guilty. Lastly, she submitted that even it it is held that accused No.1 gave blow with knife on the chest of the deceased still then one can’t jump to the conclusion that the accused committed offence punishable under Section 302 of I.P.C. According to her even as per the version of the alleged eye witness, quarrel had taken place between the accused and the deceased on some flimsy ground and as a result of the said quarrel and due to grave and sudden provocation, in the hit of anger the accused

gave only one blow with knife. So, under such circumstances, it cannot be said that the accused had in fact an intention to commit murder of the deceased. She further, submitted that the accused No.1 can at the most be convicted for the offence punishable under Section 304(ii) of I.P.C. As against this, the learned APP supported the judgment and order passed by the Additional Sessions Judge.

10. It is not in dispute that in between the night of 28.2.1997 and 31.3.1997 complainant Abdullah Farooqui admitted deceased Pappu Shah in St. George Hospital. Admittedly, at that time he was not in a position to speak and as per the hospital record he died within half an hour after admission. In inquest panchanama, Exhibit 11, it is clearly mentioned that one bleeding injury was noticed on the chest of the deceased. If we see the post mortem report which is at Exhibit 17, in column No.17 following external injury is memtioned.

> "Stab Wound mid (Rt) Epigastrium eliptical in shape, 3X3X2 cm muscle deep, obliquntly within 24 hours.

> (1) Extending through mediastium & Pericordium to antr. wall of (Rt) Ventricle of heard. (2) antr. wall of stomach (body of stomach)"

Similarly, following internal injury was also noticed.

> "Stab wound placed on Antr. wall (Rt) Ventricle, clotted blood."

The doctor has opined that death was caused due to Cardio respiratory arrest due to Haemothrox and haemoperitoneum due to stab injury to heart and stomach. Dr. Damayanti Page, Exhibit 16 has stated that the injury mentioned in column 17 was sufficient in the ordinary course of nature to cause death and the same is possible due to sharp edged weapon. So, having regard to the nature of the injuries as well as the place where the dead body was found it is clear that the death is homicidal. In fact is it not even the case of the defence that the death of Pappu is not homicidal.

11. The main and the material question is

whether the injury sustained by the deceased on his chest was caused at the hands of accused Nos.1 and 2 or either of them. At the outset it must be mentioned that it is not even the prosecution case that the accused No.2 gave any blow to the deceased. The only overt act attributed to him is that at the relevant time after there was quarrel between Pappu Shah and accused Nos.1 and 2, the accused No.2 held the hands of Pappu Shah and at that time the accused No.1 gave blow with knife to Pappu Shah on his chest. So one thing is certain that accused No.2 has not given any blow, leave aside the blow with knife or fatal blow. Though both the accused are charged for the offence punishable under Section 302 r/w. 34 of I.P.C. it appears that the trial court has convicted the accused No.2 only under Section 302 of I.P.C. and not under section 302 r/w. 34 of I.P.C. Under the circumstances of the case the conviction against the accused no.2 is not sustainable. There is also no sufficient evidence on record to indicate that both the accused had common intention to cause murder of Pappu Shah. There is nothing on record to indicate that at the relevant time the accused No.2 made any utterance or induced accused No.1 to assault Pappu Shah. One

also in fact does not know as to for what purpose and exactly at what time the accused No.2 had held the hands of the deceased. So, having regard to all these aspects we are of the view that the prosecution evidence is not sufficient to prove beyond reasonable doubt that the accused No.2 actually took any active part in the alleged offence. So, benefit of doubt is to be given to the accused No.2 and he is to be acquitted.

12. So far as accused No.1, is concerned, firstly it must be noted that he was known to witness Manoj Sakore, even prior to the incident and he also used to carry on his business on the footpath infront of G.P.O. He has specifically stated in his deposition Exhibit 9 that he was also knowing deceased Pappu Shah, the taxi driver because he also used to sleep on the footpath. The said witness has categorically stated two to three days prior to 28.2.1997 there was quarrel between Pappu Shah and accused. Then again on 28.2.1997 when he had gone for sleeping on footpath, the accused told him not to sleep there. At that time deceased told accused that he should permit him (witness Manoj Sakore) to sleep there and then there was quarrel

between them. However, the witness got scared and went at a distance of about 10ft from the said place. Then again there was hot exchange of words between the accused and the deceased and at that time Deva i.e. accused no.2 held the hands of Pappu and accused no.1 Shiva removed knife and stabbed on the chest of Pappu Shah. The evidence of witnes Manoj Sakore to the extent that accused No.1 gave blow with knife on the chest of Pappu Shah is not shaken or shattered in the cross examination. An attempt was made to show that the said witness was in fact not present there and even if it is assumed that he was present there, there was no opportunity for him to identify the assailant because at the relevant time the electricity in Bombay was not in order. Firstly, it must be noted that merely because the street lights were off, or that the electric lights in other premises were also off, that does not necessarily mean that at the relevant time there was complete dark. It may happen that even in the moon light some things may be visible. Besides this there may be some other light, for e.g. vehicle’s light, and other arrangement made by the adjoining occupants of the premises when the regular electric supply is off. We can not ignore the fact

that there was no reason for Manoj Sakore to go to the length of involving accused in such type of grave offence. The evidence of the eye witness Manoj Sakore is not shaken or shattered in the cross examination, on the contrary it appears to be quite cogent, consistent and trust worthy.

13. It has come on record that the accused while in custody made a statement before the police that he would point out the knife and accordingly memorandum was drawn and then the accused No.1. led the police and panchas to his place of residence in one chawl and there he produced one knife out of raxine bag which was kept there and it was attached under panchanama. It is clear that the said knife as well as the clothes of the accused attached under panchanama Exhibit 13 were sent to C.A. The C.A. report is produced at Exhibit 22. From the perusal of the same it appears that blood of "A" group was found on the said article which is described as "dagger" and the blood group of deceased was also "A". The clothes of the deceased were blood stained and the same were of "A" Group. Though the article before the court is called dagger, while the eye witness has stated that the accused No.1 gave the

blow with knife, no much importance can be given for this discrepancy because there was no sufficient light and the weapon was held by the accused in his hand and the entire incident occurred within a fraction of second. It is quite possible that the witness might not have actually seen as to whether the said sharp weapon held by the accused was knife or dagger. Discrepancy in that behalf will certainly not change the fate of this case. Thus, having regard to the evidence mentioned above, we have no hesitation to hold that there was sufficient evidence to show that the injury caused to deceased Pappu on his chest was at the hands of the accused No.1.

14. The learned Advocate for the accused strenuously argued before us that in the instant case there was no premeditation. The accused had even no idea that at the relevant time Pappu Shah would be present at the place. In fact, it appears that the quarrel between Pappu Shah and accused arose because accused asked witness Manoj Sakore, not to sleep at a particular place. So, on that count quarrel started and it appears that as a result of the said quarrel in the heat of passion

the accused No.1 gave blow with knife on the chest of Pappu Shah. There is no evidence on record to show that the accused had given multiple blows. Even according to eye witness Manoj Sakore, the accused No.1 had given only one blow. So, considering all these factors we are not inclined to hold that the accused No.1 had any intention to commit murder and the case will fall under Section 304 Part I. There are various authoritative pronouncements, where in similar circumstances, Apex Court has convicted the accused for the offence punishable under Section 304 Part I. In **V. Shridharan vs. State of Kerala AIR 1992 SC 754,** where as a result of provocation accused in a heat of passion chased the deceased to some distance and gave a single fatal blow, it was held that the accused is guilty of the offence punishable under Section 304 Part I. So, we are of the view that the offence committed by the accused no.1 falls under Section 304 Part I and not under Section 302 of I.P.C. Hence, we pass the following order:

ORDER

1. Appeal is partly allowed.

2. The order of conviction and sentence passed against the accused Nos.1 and 2 for the offence punishable under Section 302 read with 34 of the Indian Penal Code is set aside and they are acquitted of the offence punishable under Section 302 read with section 34 of the Indian Penal Code.

3. The accused No.1-Shivi Jaspal Chaudhary is convicted for the offence punishable under Section 304 Part I of the Indian Penal of the Indian Penal Code and sentenced to undergo imprisonment for the period already undergone till today and to pay fine of Rs.1000/_ (Rupees One Thousand Only) in default to suffer rigorous imprisonment for one month. If the fine is deposited by him and he is not required in any other case, then he be released forthwith.

4. Accused No.2 be released forthwith if not required in any other case. Fine, if deposited by the accused No.2, it be returned to him after the appeal period is over.

5. Fees of the appointed advocate Smt. Sharmila Kaushik are quantified at Rs.1000/- (Rs.

One Thousand Only).

(S.R.Sathe,J.) **(S.B.Mhase, J.)**